No. 80-714

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JEFFERSON COUNTY, COLORADO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the imposition of a Colorado property tax upon a private contractor engaged to manage a nuclear weapons facility owned by the United States violates the federal government's constitutional immunity from state taxation, where such tax does not segregate the contractor's interest (if any) in the use of the government-owned property but is based upon the fair market value of the property to which the contractor had access only for the purpose of performing the contract, and where the tax amounts to almost twice as much as the contractor's fixed management fee.

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Pursuant to Rule 16.1 of the Rules of this Court, the appellee, the United States of America, moves that the judgment of the court of appeals be affirmed.

OPINIONS BELOW

The memorandum opinion and order of the district court (J.S. App. 12-28) is reported at 460 F. Supp. 1184. The opinion of the court of appeals (J.S. App. 1-11) is reported at 627 F.2d 217.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1980 (J.S. App. 31). A timely petition for rehearing was denied by the court of appeals on September 3, 1980 (J.S. App. 32-33). On October 23, 1980, the notice of appeal was filed (J.S. App. 39-40). The jurisdictional statement was filed with this Court on October 31, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATUTE INVOLVED

Section 39-3-112 of the Colorado Revised Statutes of 1973, as amended, is set forth as J.S. 36-38.

STATEMENT

The Rocky Flats Plant, which has been owned in fee simple by the United States since 1951, is part of an integrated system of government-owned laboratories and plants operated in furtherance of the statutory responsibilities of the Atomic Energy Commission (AEC), Energy Research and Development Administration (ERDA), and the Department of En-

ergy (DOE) to develop and produce nuclear weapons for national defense.[1] The plant is located in Jefferson County, Colorado, and consists of approximately 6,500 acres of land and approximately 95 buildings and structures. No work of any kind on behalf of any private entities has ever been carried out at this plant (J.S. App. 2, 13-15).

The actual operation and direct management of the Rocky Flats Plant have been conducted by private companies under management contracts with AEC, ERDA and DOE. From July 1, 1952, through June 30, 1975, the Dow Chemical Company managed the plant. Rockwell International Corporation (Rockwell) undertook that responsibility beginning on July 1, 1975, under a management contract referred to as contract 3533. Rockwell is paid a fixed annual fee for its services (J.S. App. 2, 15-17). For the period July 1, 1975, through September 30, 1976, Rockwell's fixed

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[1] Initially, the Rocky Flats Plant was under the supervision and control of the AEC which was created as an independent agency of the United States Government by the Atomic Energy Act of 1946, ch. 724, Section 2, 60 Stat. 756, and continued under the Atomic Energy Act of 1954, ch. 1073, Section 1, 68 Stat. 919. The AEC was abolished by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, Section 104, 88 Stat. 1237, and certain of its functions were transferred to ERDA (established by Section 101), effective January 19, 1975 (Exec. Order No. 11834, 40 Fed. Reg. 2971 (1975)). One of those functions included supervision and control of the Rocky Flats Plant. Under the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, ERDA was abolished (Section 703), and all of its functions, including the activities of Rocky Flats Plant, were transferred to DOE (Section 301), effective October 1, 1977 (Section 901; Exec. Order No. 12009, 42 Fed. Reg. 46267 (1977)). We will refer to ERDA as the government agency responsible for the Rocky Flats Plant because ERDA discharged those responsibilities at all times relevant to the period involved in this suit.

fee was $2,850,000. For the period October 1, 1976, through September 30, 1977, Rockwell's fee was $2,400,000 (J.S. App. 17).

In 1975, the Colorado General Assembly enacted a statute, now referred to as § 39-3-112, Colo. Rev. Stat. (1973), as amended, effective January 1, 1976, which provides in pertinent part as follows (J.S. 2-3, 36):

> (1) When any property * * * exempt from taxation is leased, loaned, or otherwise made available to and used by a * * * corporation in connection with a business conducted for profit, the lessee or user thereof shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property * * *.

Excluded from this tax are, *inter alia*, exempt property used for agricultural purposes, property owned by certain local governmental units and leased to private parties prior to July 1, 1976, and property owned by certain local governmental units used to provide authorized governmental services. Subsections 4 and 5 of § 39-3-112, Colo. Rev. Stat. (1973 & 1976 Cum. Supp.) (J.S. App. 37-38).

In 1976, the Jefferson County Tax Assessor notified Rockwell that it was the "user" of tax-exempt property (the Rocky Flats Plant) within the meaning of the Colorado statute, and was liable for the tax on such use. For 1976, the Assessor assigned a market value to the property of $200,787,951 and an assessed value of $61,263,380 (J.S. App. 3, 19). These figures were based on the following components (J.S. App. 3, 20):

	Market Value	Assessed Value
Land (350 Acres at $5,000 per acre)	$ 1,750,000	$ 552,000
Improvements	125,506,215	38,651,860
Machinery & Equipment	73,531,736	22,059,520
	$200,787,951	$61,263,380

Using the assessed values, Rockwell was assessed $4,632,246.69 for 1976 with respect to the Rocky Flats Plant (J.S. App. 3-4, 20). Pursuant to Contract 3533, to the extent that any such taxes are determined to be due from Rockwell, the United States is obligated to provide the funds for their payment as a "cost" to be borne by the United States (J.S. App. 4).

2. After the exhaustion of all administrative remedies (J.S. App. 20), the United States brought this action in the United States District Court for the District of Colorado, for a declaratory judgment that the Jefferson County tax on Rockwell was (i) in reality a tax on property owned by the United States, and (ii) a discriminatory tax against the United States and those with whom it dealt, and was therefore barred by the Supremacy Clause of the United States Constitution (J.S. App. 4, 27-28).

The district court determined that the Colorado statute, as it was sought to be applied, failed to segregate Rockwell's interest from that of the United States, and was therefore a tax on property owned by the United States. It observed that Rockwell was required to pay a tax which was almost double the amount of the total payment for its contract services. In the court's view, "[i]t [was] inconceivable that the value of an independent contractor's bene-

ficial use interest in Government property [could] be considered to be so much greater than the amount which the Government [was] willing to pay to that contractor" (J.S. App. 23). Accordingly, it determined that the tax infringed the immunity of the United States from the imposition of local taxes on governmental property under the Supremacy Clause of the United States. As a result, the court did not consider the government's alternative claim that the tax in question unquestionably discriminated against the United States and those with whom it dealt (J.S. App. 4-5, 20-28).

The court of appeals affirmed. It agreed that under this Court's decision in *United States* v. *County of Allegheny*, 322 U.S. 174, 185 (1944), the impact of the statute was "not to tax Rockwell's 'use' of government owned property but to lay an ad valorem general property tax on property owned by the United States" (J.S. App. 11). It therefore concluded that the tax was barred by the Supremacy Clause which immunizes the United States from the imposition of state and local taxes (J.S. App. 4-11, 31).

ARGUMENT

1. The courts below correctly held that the Colorado statute as applied in this case taxed the federal government's property and was thereby barred by the Supremacy Clause of the Constitution.

a. In *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court first expounded the principle that properties, functions, and instrumentalities of the federal government are immune from state taxation. "[U]nshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of

express congressional consent are not subject to any form of state taxation." *United States* v. *County of Allegheny*, 322 U.S. 174, 177 (1944). See also *Department of Employment* v. *United States*, 385 U.S. 355, 358-359 (1966); *United States* v. *Tax Commission of Mississippi*, 421 U.S. 599, 612-613 (1975); *United States* v. *County of Fresno*, 429 U.S. 452, 459 (1977). Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared." *M'Culloch* v. *Maryland*, *supra*, 17 U.S. (4 Wheat.) at 436.

It is well established that a local tax may constitutionally be imposed upon the use by a private corporation of machinery and other property owned by the United States and leased to the private party for use in its business. *City of Detroit* v. *Murray Corp. of America*, 355 U.S. 489 (1958); *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958); *United States* v. *County of Fresno*, 429 U.S. 452, 462 (1977). But it is equally clear that where a tax fails to identify, segregate and evaluate the private party's interest in the property owned by the federal government, and is based on a value exceeding the private party's interest in that property, the tax is on the federal government's property and violates the United States' immunity from local taxation. *United States* v. *County of Allegheny*, *supra*; *United States* v. *County of Fresno*, *supra*, 429 U.S. at 462-463 n.10.

As the court below recognized (J.S. App. 6), the key to determining whether a state tax has been impermissibly imposed on the federal government is "the relationship between Rockwell and the United States and the nature of the activity which the State of Colorado seeks to tax." Here, appellants made no effort to identify and separate Rockwell's interest (if any) in the Rocky Flats Plant, and to tax only

the value of that interest to Rockwell. Rather, they sought to tax the entire value of the plant and imposed a tax equal to almost twice the amount of Rockwell's fixed management fee. As a result, the tax was levied in at least substantial part upon the government's ownership interest in the plant (J.S. App. 6, 22-23). The imposition of the tax therefore infringed the government's immunity from state taxation under this Court's decisions in *County of Allegheny* and *County of Fresno*.

b. The details of the arrangement between Rockwell and the government confirm the correctness of the decision below. Rockwell's association with and use of the Rocky Flats Plant are controlled by Contract 3533. Rockwell is the instrument through which ERDA carries out its statutory responsibilities to produce nuclear weapons.[2] Rockwell renders managerial services to the United States for the purpose of operating the Rocky Flats Plant to the extent expressly specified by the United States, and functions under the direction and control of the United States. Rockwell has no lease, permit or license to the property in question, which is owned in fee simple by the United States (J.S. App. 6, 15-17). Rockwell brought in 12 of its senior management officials to run an operation employing 2,800 persons (R. 360).[3]

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[2] As this Court noted in *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 235 (1952), the original Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (and the successor Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919, under which the Rocky Flats Plant is operated) "adopt[ed] as the national policy the use of 'management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry.' "

[3] "R." refers to the original record on appeal in the court of appeals.

The principal function of the Rocky Flats Plant has always been the production of certain components for nuclear weapons. The essential ingredient used at Rocky Flats is plutonium, which is a "special nuclear material" as defined in Section 11 of the Atomic Energy Act of 1946 (42 U.S.C. 2014(aa)).[4] Plutonium used in the manufacture of nuclear components is owned by the United States. Indeed, the possession and use of plutonium for production of atomic weapons is permitted by law only in ERDA facilities operated in furtherance of ERDA's statutory responsibilities. No private firm can obtain a license to own, possess, use or transfer plutonium for the purpose of manufacturing and producing the nuclear components which are the products of the Rocky Flats Plant.[5] In short, federal law prohibits a firm such as Rockwell from acquiring a possessory interest in such an operation. Pursuant to Section 91 of the Atomic Energy Act of 1946 (42 U.S.C. 2121), the scope of the primary production activity carried on at the Rocky Flats Plant is subject to the express consent and direction of the President of the United States. It is only in accordance with such authorization that ERDA issues directions to Rockwell to manufacture products according to the speci-

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[4] The Atomic Energy Act of 1946, ch. 724, 60 Stat. 755, was amended in its entirety by the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919. The Atomic Energy Act Sections cited are Sections of the 1946 Act as amended in 1954, and with later amendments incorporated at 42 U.S.C. 2011 *et seq.*

[5] Atomic Energy Act of 1946, Sections 91, 92, 110 (42 U.S.C. 2121, 2122, 2140); Energy Reorganization Act of 1974, Pub. L. No. 93-438, Section 202, 88 Stat. 1244 (42 U.S.C. 5842); Nuclear Regulations on Domestic Licensing of Special Nuclear Material, 10 C.F.R. 70.11, 70.32(a)(6); R. 358-359; J.S. App. 17-18.

fications and in the quantities prescribed. Any products not meeting such specifications are recycled or otherwise disposed of according to ERDA directions and at the government's expense, without any loss of fee or other penalty to Rockwell. During the period at issue, the plant has operated at no more than 28% of capacity (J.S. App. 18).

ERDA provides from the United States Treasury, through the letter-of-credit method of advanced funding, all of the funds necessary to sustain the operations of the Rocky Flats Plant under Contract 3533. No funds come from Rockwell (J.S. App. 16-17). In consideration for rendering management services under the contract, Rockwell is paid a fixed fee negotiated annually, which was $2,850,000 for the period July 1, 1975, through September 30, 1976, and $2,400,000 for the period October 1, 1976, through September 30, 1977 (J.S. App. 17).

It is therefore plain that Rockwell has no possessory interest in the Rocky Flats Plant that would be an occasion for the imposition of the Colorado ad valorem property tax. To the contrary, the performance of its management services under Contract 3533 requires that it have access to that Plant. Pursuant to that contract, Rockwell had no title or other legal interest in the plant that enabled it to use the facility for any enterprise it chose. On the contrary, Rockwell had access to the plant for the sole purpose of rendering managerial services to the United States. In this respect, Rockwell's relationship to the plant is not unlike the relationship that any government employee or agent has to a particular piece of machinery or equipment necessary for the performance of his official duties and unavailable for any personal use. In that case, the employee's or agent's interest in the machinery is solely as the means to earn his

wages or fee. Here, too, the Rocky Flats Plant serves as the mechanism by which Rockwell is obliged to perform managerial services pursuant to the contract. Such an interest, we submit, is not a proper subject of state ad valorem property taxation. Yet not only have appellants treated Rockwell as if it had some possessory interest in the Rocky Flats Plant for its own use. They have asserted a tax against Rockwell as if the interest of Rockwell in the Plant were coterminous with that of the United States. The decision below therefore properly held the tax to infringe the interest of the United States and therefore violate the Supremacy Clause.

c. At all events, even if Rockwell is deemed to have a possessory interest in the Plant that could constitutionally be taxed, appellants' failure to segregate that interest bars the tax under the Supremacy Clause. Indeed, the consequence of the County's failure to segregate whatever limited possessory interest in the Plant Rockwell might have is evidenced by the fact that the annual ad valorem tax for 1976 was $4.6 million while Rockwell's annual fee for that year fell within the range of $2.4 and $2.85 million. As the district court properly observed (J.S. App. 23):

> Here Rockwell is being called upon to pay a tax which is almost double the amount of the total payment for its contract services. It is inconceivable that the value of an independent contractor's beneficial use interest in Government property can be considered to be so much greater than the amount which the Government is willing to pay to that contractor. The fact that it is Rockwell's contractual right to pass on that burden to the Government does not save the conceptual incongruity of this tax.

Since the tax upon Rockwell is indisputably greater than its interest in the plant, it is plain, as the court of appeals concluded, that "[t]he 'substance of the present procedure is not to tax Rockwell's use' of government owned property, but to lay an ad valorem general property tax on property owned by the United States" (J.S. App. 11).

In urging affirmance, we do not suggest that a tax measured by the value of government-owned property may never be imposed on a private party who is using it. That argument was put to rest by *United States* v. *City of Detroit*, 355 U.S. 466 (1958), and its companion cases. See *City of Detroit* v. *Murray Corp. of America*, *supra*, 355 U.S. at 495 (Frankfurter, J., concurring and dissenting). Indeed, to the extent that *United States* v. *Allegheny County*, *supra*, so holds, it has been overruled by *City of Detroit*. See *United States* v. *County of Fresno*, *supra*, 429 U.S. at 462-463 n.10. But the decision below properly relied upon another aspect of *Allegheny County*, which survived *City of Detroit*, viz., that government property used by a private citizen may not be taxed at its full value where contractual restrictions on its use render the property less valuable to the user. There, as here, the contractor's right to use the property was strictly qualified by the contract. The Court therefore held invalid an ad valorem tax on the full value of the machinery. As the Court stated, in terms equally appropriate to this case, "Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide * * *. [T]he state has made no effort to segregate Mesta's interest [in the machinery] and tax it. The full value

of the property including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment" (322 U.S. at 186-187). Applying this principle, the Court in *United States* v. *County of Fresno*, *supra*, upheld a state possessory use tax upon government housing occupied by government employees where the assessments took account of government-imposed limitations on use.

2. Contrary to appellants' argument (J.S. 10-19), the decision below does not conflict with either *United States* v. *Township of Muskegon*, *supra*, or *United States* v. *Boyd*, 378 U.S. 39 (1964).

a. In *Township of Muskegon*, the United States allowed Continental Motors Corporation to use a government-owned plant to fulfill several government supply contracts that it was performing as a vendor. No rent was charged for the plant, and Continental agreed not to include any costs of operating the plant in the price of the products which it was selling to the United States. In exchange for the goods accepted by the government, Continental received a fixed fee. The Township of Muskegon assessed an annual ad valorem tax under a state statute that provided that when otherwise tax-exempt property was used by a private party in business conducted for profit, the private party was subject to taxation as though he owned the property. The tax assessed against Continental's interest in the federally owned facility was measured by the full value of the property.

The Court upheld that tax on the authority of its decision in the companion case of *United States* v. *City of Detroit*, *supra*. There, the Court observed that in enacting such a tax, the state legislature

attempted to equate the economic tax burden placed on a private enterprise using exempt property with a similar enterprise using taxable private property. The private owner would certainly pass the tax on to the user of the property. Thus, the full value of the tax-exempt property was a proper measure of the tax asserted against a user of tax exempt property (350 U.S. at 470, 473-474). In *Township of Muskegon*, the Court further observed that Continental was "acting as a private enterprise selling goods to the United States" and that "[i]t was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them" (355 U.S. at 486).

To be sure, the Michigan statute upheld in *Township of Muskegon* closely resembles the Colorado statute at issue here. But the factual circumstances of this case are substantially different. Unlike Continental, Rockwell had no broad right to use the Rocky Flats Plant as it deemed convenient and advantageous in order to maximize its profits. Rockwell's managerial contract gave it no possessory interest in the property warranting the imposition of an ad valorem property tax. At the very least, Rockwell's possessory interest could not constitutionally be computed on the full value of the property. Hence, while the imposition of the tax upon the full value of the property was justifiable in *Township of Muskegon*, it was fatal in this case where Rockwell had access to the property solely for the purpose of performing its managerial services under the contract. In such circumstances, the Colorado assessor's failure to segregate whatever interest Rockwell might arguably have and tax only that interest means that the tax was

imposed in at least substantial part on the federal government's interest in the property and that the tax therefore violated the government's tax immunity under the Supremacy Clause. Moreover, it is highly unlikely that in the private sector an owner would pass on a property tax to a manager of its property. Thus, unlike the Michigan statute, the Colorado tax does not equate the economic burden upon Rockwell with that placed on any competitor in the private sector. Appellants' suggestion (J.S. 27-29) that a manager's interest in a governmental facility may be greater than what the government would be willing to pay the manager is, as the district court observed (J.S. App. 23), inconceivable.[6]

b. *United States* v. *Boyd*, *supra*, is likewise distinguishable. There, this Court sustained a "contractor's use tax" (378 U.S. at 40) on ordinary tangible personal property that an AEC management contractor had purchased on its own initiative for its use in performing its contract with the United States. That tax, which was imposed one time only on the purchase price or fair market value of the property used, at the sales and compensating use tax rate, was collected only when a sales tax on local purchases or a compensating use tax on out-of-state goods had not previously been collected in connection with that property. Here, by contrast, the Colorado tax is imposed annually on the full value of government-owned property without segregating the contractor's limited

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[6] Appellants' analogy to an owner's interest in real estate (J.S. 28-29) is misplaced. Admittedly, the profit an owner of property might make has no relationship to the value of the property. But it does not follow that a manager's interest in property can be divorced from what an owner is willing to pay the manager for management services when the manager has no other interest in the property.

rights to that property. Nothing in *Township of Muskegon* approves such a levy, which this Court more than 40 years ago characterized as in essence "an ad valorem general property tax on property owned by the United States." *United States* v. *County of Allegheny, supra*, 322 U.S. at 185.

Moreover, unlike the Colorado tax, the Tennessee tax at issue in *Boyd* was limited to the use of ordinary items of personalty, which had no unique governmental character and which would ordinarily be purchased, possessed, and ultimately consumed, by almost any contractor or manager in the course of normal business ventures. In contrast, the Colorado tax sought to be imposed here is not on goods acquired by Rockwell from third parties and used by Rockwell in performance under its contract with the United States. Rather, appellants seek to impose a tax on Rockwell measured by the value of the government-owned Rocky Flats Plant, to which Rockwell has access merely to perform managerial functions. But in performing its management functions, Rockwell was not permitted to act with respect to the plant as an owner, lessee, or bailee with unrestricted rights of possession.[7]

3. Even if the Colorado tax were regarded as imposed only on Rockwell's use of government-owned

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[7] Contrary to appellants' suggestion (J.S. 27), *United States* v. *New Mexico*, 624 F.2d 111 (10th Cir. 1980), petition for cert. pending, No. 80-702 (J.S. 27), does not bear upon the question presented here. That case involves the application of a gross receipts and compensating use tax on items purchased by the contractor, and on funds disbursed by it under the advance funding procedure. Resolution of the immunity issue in *New Mexico* turns upon whether the contractor is, in those transactions, acting as an agent of the government.

property, and not on the government-owned property itself, the tax is nevertheless unconstitutional because it discriminates against the federal government and those persons with whom it deals. Apart from the fundamental rule that the federal government is immune from state taxation, it is equally well settled that a state may not discriminate against the federal government and those with whom it deals. See, *e.g.*, *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 385-387 (1960); *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 751 (1961); *United States* v. *County of Fresno*, *supra*, 429 U.S. at 460, 462. As this Court stated in *United States* v. *City of Detroit*, *supra*, 355 U.S. at 473, "[i]t still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals."

Because the courts below found that the tax assessed against Rockwell was in substance an impermissible tax on property of the United States, they did not reach the issue whether the tax was discriminatory—an issue raised in both courts below (J.S. App. 28; appellee's brief in the court of appeals, at 42-44). But, as the prevailing party, we may, of course, raise the discrimination argument in support of the judgment. *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 n.13 (1975); *Dandridge* v. *Williams*, 397 U.S. 471, 475-576 n.6 (1970).

The Colorado tax at issue here is discriminatory in several respects. It does not apply to any use or management of property owned by a county or other local government (1) if the property was subject to payments in lieu of taxes (§ 39-3-112.(4)(a) (J.S. App. 37)), or (2) if the property was, before July

1, 1976, leased, loaned, or otherwise made available to and used by a private person or corporation in connection with a business conducted for profit (§ 39-3-112.(4)(b) (J.S. App. 37-38)). Further, the tax does not apply to any use or management of property owned by any political subdivision of the state which is "used in the provision of normal facilities, services, or operations authorized by constitution or statute to be provided by such political subdivisions" (§ 39-3-112.4(d) (J.S. App. 38)).

A tax that treats local governments and the federal government differently is discriminatory and unconstitutional. *United States* v. *Clayton*, 250 F. Supp. 827 (E.D. N.C. 1965), appeal dismissed, 384 U.S. 154 (1966); *Knapp-Stiles, Inc.* v. *Michigan Department of Revenue*, 370 Mich. 629, 639-640, 122 N.W.2d 642, 647 (1963). Cf. *Chrysler Corp.* v. *Township of Sterling*, 410 F.2d 62 (6th Cir. 1968). As the court in *Clayton* said (250 F. Supp. at 830-831), in paraphrasing this Court's holding in *Phillips Chemical Co.*, "it does not seem too much to require that a state treat the federal government as well as it treats itself or its political subdivisions."

Here, Colorado would not impose a tax upon a manager of property owned by a political subdivision, if that property were used for governmental purposes. Yet it attempts to impose a tax upon a manager of the federal government's property used to carry out unique governmental functions dealing with nuclear arms. Moreover, if the same party had concluded a management contract with a local government prior to July 1, 1976, it would not be required to pay the tax. Yet Rockwell, which entered its management contract with the federal government before that date, is required to pay the tax. In addition, if ERDA were to make a payment in lieu of taxes—as

it is empowered to do by Section 168 of the Atomic Energy Act, 42 U.S.C. 2208 (although the record does not indicate that any such payments have been made), its management contractor would have to pay a tax. The manager of a local government's property, however, would not be subject to tax in similar circumstances. Finally, the Colorado tax exempts agricultural users of otherwise tax-exempt land (§ 39-3-112.(5) (J.S. App. 38)), and the recreational users of tax-exempt land are taxed on a percentage of the rental payments for the land, not on the value of the land (§ 39-3-112.(6) (J.S. App. 38)).

In sum, Rockwell, as manager of the Rocky Flats Plant, bears a more onerous tax burden than is imposed on managers of property owned by Colorado political subdivisions, on property used for agricultural purposes, or on property used for recreational purposes. The tax is thus discriminatory against the United States and those with whom it deals, and is therefore invalid.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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